No. 17-204

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1] AAI has a strong interest in ensuring effective public and private enforcement of the antitrust laws. The issue in this case—whether consumers who purchase directly from Apple, an alleged monopolist, may sue Apple for damages—implicates a core feature of this nation's antitrust regime.

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. No counsel for a party has authored this brief in whole or in part, and no person other than amicus curiae has made a monetary contribution to fund its preparation or submission.

INTRODUCTION AND BACKGROUND

This case raises the question of whether a retailer that unlawfully monopolizes the distribution and sale of a popular product and thereby raises retail prices can avoid liability to its customers under the "indirect purchaser" rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), because it permits suppliers to price its product within limits dictated by the retailer. AAI takes no position on the merits of respondents' monopolization claims, and the merits should be irrelevant to the *Illinois Brick* question.[2]

A ruling in favor of petitioner would have far-reaching adverse consequences because, without consumer standing in cases like this, monopolistic conduct may be immunized from damages claims. It is unlikely that suppliers would challenge a distribution monopoly. They are, by definition, beholden to the monopolist to distribute their product, and some of them may benefit from the monopoly. Moreover, as here, no excluded rival may exist to challenge the monopolistic conduct.

Accordingly, a ruling in favor of petitioner would harm consumers not merely by denying them compensation for injuries inflicted by unlawful monopolization in cases like this, but also by substantially reducing deterrence of antitrust violations by dominant retail firms operating under an "agency model." Consumers would also be harmed insofar as they would be denied a market-based determination of

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[2] Since the case arises on a motion to dismiss, the well-pleaded allegations in the complaint must be accepted as true. It is worth noting that because *Illinois Brick* does not bar claims for equitable relief, a ruling in petitioner's favor would not terminate the case.

appropriate distribution models. If retailers using the agency model, rather than the traditional "wholesale model," receive more favorable antitrust treatment, firms will be induced to adopt the agency model, regardless of whether it would otherwise be more or less efficient to do so. And firms using a wholesale model would be unfairly disadvantaged.

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Respondents allege that they "purchased software applications or licenses for software applications" from Apple's App Store for use on iPhones. Pet. App. 40a (¶1). They contend that "Apple violated Section 2 of the Sherman Act by monopolizing or attempting to monopolize the software applications aftermarket for iPhones." Pet. App. 45a (¶15). Apple's anticompetitive conduct is directed at both app developers and consumers, and includes: "(a) designing the iPhone iOS as a closed system and installing security measures and program locks for the specific purpose of preventing Third Party App downloads; (b) establishing the App Store as the exclusive worldwide distributor of iPhone apps; and (c) enforcing the App Store's monopoly status by terminating or threatening to terminate apps developers who sell apps in competition with Apple and by voiding the warranties of iPhone consumers who buy competing apps." Pet. App. 60a (¶71), 61a-62a (¶76).

As a result of Apple's monopoly, app developers have no choice but to sell their apps through the App Store. And consumers have no choice but to buy iPhone apps from the App Store. Respondents allege that they "have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid in a competitive market." Pet. App. 53a (¶45).

Apple concedes that respondents buy apps directly from it. It explains that "[i]n electronic marketplaces such as Apple's App Store at issue in this case, the marketplace sponsor interacts with and delivers goods 'directly' to consumers." Pet. Br. i. And it accepts respondents' characterization that "'Apple places the developers' apps on the virtual shelves of its App Store, sells them *directly* to iPhone customers, charges and collects the full price (including its own 30% fee) from customers, keeps its 30% fee from every sale or license, and then remits the balance of the purchase price to the developer.'" *Id.* at 8 n.2 (emphasis added) (quoting respondents' brief in the Ninth Circuit).[3]

All app developers must accept Apple's non-negotiable license, under which Apple, among other things: (1) approves, in its sole discretion, all apps before offering them for sale in the App Store; (2) hosts all apps on its own servers; and (3) reserves the right to terminate developers with or without cause. *See* Apple License §§ 1, 6 & Sch. 2, §§1.2(b), 2, 3.1, and 7.3.

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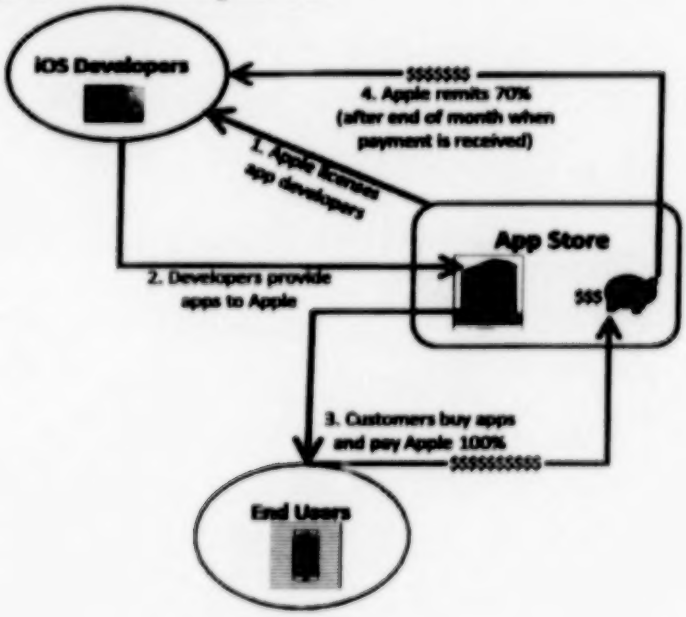
[3] Apple remits the 70% payment to developers following the close of the month in which it receives the end-user's payment. Apple, Developer Program License Agreement, Sch. 2, §§ 3.4, 3.5 (June 4, 2018) ("Apple License"), https://download.developer.apple.com/Documentation/License_Agreements__Apple_Developer_Program/Apple_Developer_Program_License_Agreement_20180604.pdf. This URL link includes in its file identification the date June 4, 2018 ("20180604"), which is "[t]he latest [Apple Developer Program License] agreement." Apple Review, Guidelines, https://developer.apple.com/app-store/review/ (last visited Oct. 1, 2018). Apple admits that its license is "widely available on the internet." Pet. Br. 36 n.15.

The following diagram illustrates the relationships between the parties:



SUMMARY OF ARGUMENT

This Court should not expand the *Illinois Brick* rule to bar iPhone users who purchase apps directly from Apple from suing Apple for monopolization merely because Apple permits app developers some discretion to price the apps that Apple itself sells to iPhone users.

1. This Court's three decisions involving direct and indirect purchasers—*Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990)—do not support treating the respondents here as indirect purchasers. *Hanover Shoe* refused to allow

the monopolist to escape overcharges that its own customer paid by arguing that the overcharges moved down the distribution chain to others. *Illinois Brick* and *UtiliCorp* similarly refused to permit persons down the distribution chain, who did not purchase from the antitrust violator, to claim damages from the violation. By contrast, respondents are the "immediate buyers from the alleged antitrust violator[]"—Apple. *UtiliCorp*, 497 U.S. at 207. A straightforward reading of the cases establishes that respondents are direct purchasers.

Respondents' damage theory will involve comparing the price that Apple would have charged consumers in a competitive market compared to the allegedly inflated price that they in fact paid Apple. Contrary to Apple's contention, it is not dispositive that respondents' theory may require them to prove how app developers' pricing would change if Apple reduced its commission. Antitrust cases commonly require a plaintiff to show how cost changes, both up and down, affect market prices, and the proof here is less complicated than Apple maintains.

Illinois Brick's concern about the difficulty of proving "pass on" arose where the alleged victim was disconnected from the antitrust violator by one or more levels in the distribution chain. There is no such disconnect here. To the contrary, Apple and respondents deal directly. Moreover, difficulty of proof was only one of the policy considerations, which, on the whole, militate in support of standing here, as discussed below.

2. While Apple contends that the Ninth Circuit elevated form over substance by focusing on the distribution function that Apple serves, rather than how

it prices its product, Apple is the one seeking to elevate form over substance. The substance of the matter is that monopolization in the middle of a distribution chain has both upstream and downstream effects, regardless of whether sales to consumers are made using a traditional "wholesale" pricing model or an "agency" pricing model like Apple's.

Under a wholesale model, consumers would have standing to recover from Apple the overcharge paid for apps, and developers would have standing to recover lost profits resulting from artificially depressed wholesale prices or reduced sales. Nothing in economics or antitrust law suggests that a different *Illinois Brick* rule should apply to the "agency" pricing model. If a more favorable rule for retailers that follow such a model were adopted, firms would have incentives to use it to evade antitrust scrutiny—a result that would harm consumers, distort business decisionmaking, and unfairly disadvantage businesses using a traditional wholesale model not similarly amenable to such evasion.

Apple's argument that respondents are really challenging "distribution services" that Apple sells to app developers, as to which consumers are merely indirect purchasers, is a makeweight. This argument distorts the complaint, ignores that Apple provides the same services without charge to developers who provide "free" apps as it does to developers who provide apps with a price tag, and is inconsistent with how Apple transacts with app developers (by paying *them*). In any event, the argument is irrelevant. Every buyer in a distribution chain, even a traditional retailer like Best Buy, provides "distribution services" to its suppliers the cost of which can be measured by

the difference between the wholesale price it pays suppliers and the price at which it resells. What counts is not how the relationship between suppliers and distributors is characterized, but that Apple's monopolization of the retail distribution level has adverse effects on its suppliers and consumers, and each should be able to recover, based on non-duplicative claims. There is no antitrust rule or principle that restricts standing to only one group harmed by anticompetitive conduct.

Apple's assertion that it is merely the "agent" of app developers is similarly a fiction. Apple controls the terms on which developers are permitted to have Apple sell their apps in the App Store. Apple cannot use its non-negotiable license, required of all app developers, to appoint itself an "agent," and then use its self-appointment to dissociate itself from overcharges that Apple extracts from its own customers.

3. *Hanover Shoe* and *Illinois Brick* are premised on "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws." *Illinois Brick*, 431 U.S. at 745. Preventing consumers from suing a distribution monopolist that follows an agency pricing model seriously undermines deterrence. Suppliers who, by definition, depend on the monopolist to distribute their product, are unlikely to sue. Here, app developers cannot risk being excluded from the App Store for suing Apple because there is no other way to offer iOS apps to iPhone users. A recent example involving a popular app, discussed *infra*, supports the point. Moreover, some app developers may benefit from Apple's monopoly.

There is no risk of duplicative damages in this case because, if app developers did sue, they would

seek recovery of their lost profits, just as a supplier to a retailer following a wholesale model ordinarily would. And consumers would recover for their overcharges measured by the increase in app prices they paid to Apple.

Proving the price of apps that consumers would have paid in a competitive market is no more complicated than in other monopoly or price fixing cases. Indeed, in the "eBooks" litigation against Apple and several publishers, expert econometric analysis—similarly available here—considered over 149 million sales of 1.3 million book titles, sold at different price levels by various eBook vendors. The court certified a class of eBook purchasers, and the litigation eventually settled for more than $560 million.

4. Finally, as the United States points out, there is no basis for the Court to revisit *Illinois Brick* and *Hanover Shoe* here. To the extent there are problems with the current private enforcement regime, they tend to be exaggerated and are better addressed by Congress.

ARGUMENT

I. *ILLINOIS BRICK*'S PROHIBITION OF INDIRECT-PURCHASER DAMAGE ACTIONS DOES NOT EXTEND TO RESPONDENTS' PURCHASES FROM APPLE

"Because protecting consumers from monopoly prices is the central concern of antitrust, buyers have usually been preferred plaintiffs in private antitrust litigation. As a result, consumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted." IIA Phillip E. Areeda & Herbert Hovenkamp, et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 345, at 179 (4th ed. 2014); *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'") (quoting Robert Bork, *The Antitrust Paradox* 66 (1978)).

To be sure, in *Illinois Brick*, 431 U.S. 720, this Court limited consumer standing when consumers are indirect purchasers in a chain of distribution, but the circumstances here are quite unlike those that prompted the *Illinois Brick* rule and that are reflected in the Court's other cases involving direct and indirect purchasers, *Hanover Shoe*, 392 U.S. 481, and *UtiliCorp.*, 497 U.S. 199. *Hanover Shoe* refused to allow the monopolist to escape overcharges that its own customer paid by arguing that the overcharges moved down the distribution chain to others. *Illinois Brick* and *UtiliCorp* similarly refused to permit persons down the distribution chain, who did not purchase from the antitrust violator, to claim damages from the violation. The Court was concerned about the "'massive evidence and complicated theories'" in-

volved in "trac[ing] the effect of the overcharge *through each step in the distribution chain* from the direct purchaser to the ultimate consumer." *Illinois Brick*, 431 U.S. 741 (quoting *Hanover Shoe*, 392 U.S. at 493) (emphasis added).

Here, the alleged antitrust violator is not an upstream firm in a chain of distribution. Rather, Apple admittedly sells apps *directly* to iPhone owners through the App Store, and owners pay Apple *directly* before app developers receive any compensation, *i.e.*, iPhone owners are the "immediate buyers from the alleged antitrust violator[]." *UtiliCorp*, 497 U.S. 207.

Nevertheless, Apple argues that iPhone owners are not "direct purchasers," primarily because Apple partially outsources the pricing of apps to app developers. *See* Pet. Br. 37 (what counts is "who is setting the price, and what does that mean for the plaintiffs' damages theory").[4] According to Apple, figuring out the prices that app developers would set in a competitive market with reduced commissions would be incredibly complex. *See* Pet. Br. 27. But as discussed *infra*, Apple overstates the difficulty of proof. Moreover, while difficulties of proof were certainly one rationale for *Illinois Brick*, on the whole, the rationales support standing here. *See infra* at pp. 21-28.

In any event, *Illinois Brick* and *UtiliCorp* do not hold that any time a plaintiff's damages theory depends on proof of how market prices are affected by a cost increase, the plaintiff is an "indirect purchaser." If that were the case, then a consumer would not

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[4] The outsourcing is partial because Apple *restricts* developer pricing discretion by dictating that (1) the lowest price tier for an app is 99 cents, and (2) all higher tiers must be set in $1 increments, ending in 99 cents. Pet. Br. 9; Res. Br. 7.

have standing to recover against a monopolist that raises its rivals' costs if the increase in market prices depends on showing how much of those costs are "passed on" by the rival. And consumers from a cartel would have no standing if their damages theory depended on showing how some exogenous cost increase affected the cartel's prices. Antitrust cases commonly require a plaintiff to show how cost changes, both up and down, affect market prices.

Illinois Brick's concern about the difficulties of proof of "pass on" was limited to the context of deciding which entity in a linear chain of distribution, from antitrust violator to end consumer, should have standing. Accordingly, it held simply that, as between the direct and indirect purchasers in such a chain of distribution, the antitrust claim belongs to the former. In the arrangement among app developers, Apple, and consumers, the "immediate buyers" from Apple, the alleged antitrust violator, are consumers. That is sufficient under *Illinois Brick*.

II. APPLE'S USE OF AN "AGENCY MODEL" SHOULD NOT INSULATE IT FROM MONOPOLIZATION CLAIMS BY ITS CUSTOMERS

A. Monopolization of Distribution Has the Same Economic Effect Regardless of Whether the Monopolist Uses an Agency or Wholesale Model

Apple operates the App Store under an "agency model" whereby Apple has enlisted developers to set the retail price of the apps that it sells—subject, of course, to Apple's pricing rules. If Apple operated the App Store, instead, under a "wholesale model"—as it does for example with iTunes—it would pay a whole-

sale price for apps to developers and set the retail price of apps to consumers. *See generally* Richard J. Gilbert, *E-books: A Tale of Digital Disruption*, 29 J. Econ. Persp. 165 (Summer 2015) (describing difference between wholesale and agency pricing models). Under either model, the effect of its monopolization of app sales is comparable: injured consumers pay higher prices and injured app developers lose profits.[5] If Apple employed a wholesale model, consumers clearly would have standing to recover from Apple the overcharge paid for apps, and developers would have standing to recover their lost profits resulting from lower wholesale prices or reduced sales.[6]

Nothing in economics or antitrust law suggests that a different *Illinois Brick* rule should apply to the use of an agency pricing model. On the contrary, this Court has repeatedly emphasized that antitrust treatment should not turn on formalist distinctions, as Apple itself recognizes. Pet. Br. 17, 34; *see Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 762, 772-73 (1984) (rejecting "intra-enterprise conspiracy" doctrine because it "looks to the form of an enterprise's structure and ignores the reality" and "[i]f antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions").

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[5] Apple's 30% commission is analogous to a tax on apps, the incidence of which will be the same whether imposed on developers or consumers. *See* Kyle D. Logue & Joel Slemrod, *Of Coase, Calabresi, and Optimal Tax Liability*, 63 Tax L. Rev. 797, 799 (2010) (discussing the "theorem of the invariance of tax incidence") (citation and internal quotations omitted).

[6] Some suppliers could also benefit from the retail monopoly under either model.

The costs to take a product from its producer to the end-user are economic facts that do not depend on whether parties in the distribution chain adopt an agency pricing model or a wholesale model: "a distribution system that relies on brokerage is *economically indistinguishable* from one that relies on purchaser-resellers." IIA Areeda & Hovenkamp, *supra*, ¶ 345, at 183 (emphasis added); *see also id.* ¶ 346, at 211-12. The Court of Appeals grasped this point well: "[T]he distinction between a markup and a commission is immaterial. The key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function." Pet. App. 20a-21a.

This Court should decline Apple's invitation to expand the *Illinois Brick* rule so as to encourage businesses to adopt a business model by which dominant companies could immunize themselves against antitrust scrutiny for sales to their own direct customers. A firm's choice among business models should be determined by the free market, not by distorting antitrust rules. *See* Gilbert, *supra*, at 177 (outlining relevant factors). Apple points to the proliferation of online platforms that use an agency pricing model and suggests that this is a reason to preclude consumer suits. Pet. Br. 45. But this shows only the importance of *not* granting more favorable antitrust treatment to firms using the agency model than to those using a traditional wholesale model.

B. Apple's Distribution Services Argument Lacks Merit

Apple seeks to characterize respondents' claim as one challenging Apple's monopolization of "distribution services" purchased directly by app developers,

thereby making respondents only indirect purchasers from Apple and presumably direct purchasers from app developers.[7] Of course, the complaint itself challenges Apple's monopolization of app sales to consumers, not the monopolization of distribution services. Moreover, the characterization of app developers as purchasers of distribution services is inapt on its face because the 30% commission, which supposedly represents the charge for these services, is levied only upon developers who sell paid apps, not developers offering free apps. Nor do app developers purchase these services directly, since they "pay" Apple only after Apple itself is paid in the first instance by the customer.[8] And in any lawsuit against them (in this case or otherwise), app developers would surely claim that consumers are merely indirect purchasers of apps from them.

It is, therefore, more apt to characterize app developers as *sellers* or licensors of apps to Apple for which they are paid 70% of the purchase price that

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[7] Apple characterizes the distribution relationship as: Apple (services) ▸ app developers (apps) ▸ consumers.

[8] Even assuming, *arguendo*, that app developers could be characterized as purchasers of distribution services, that the overcharge sought by respondents is Apple's supra-competitive commission (which it is not; *see infra* at p. 25), and that there can be only one direct purchaser under *Illinois Brick*, the role of direct purchaser would still be assigned to "[t]he first party that directly pays an alleged overcharge." Pet. Br. 17. And that party is the consumer. App developers would make no "purchase" of distribution services until *after* a consumer pays for the app and Apple deducts the commission from the consumer's payment. Moreover, app developers would not be injured until *after* they received less revenue from Apple as a result of some combination of a higher commission and a price point that does not fully offset the higher commission.

Apple receives from customers. In any event, antitrust treatment should not turn on the characterization of app developers as buyers or sellers, since the effect of Apple's monopolization on consumers is the same regardless of how the developers are labeled.

Indeed, Apple's distribution services argument proves too much. Whenever a product moves through marketing levels, the higher-level participant may be said to purchase "distribution services" from the next lower level participant, even if the retailer operates under a traditional wholesale model. *See, e.g., Cont'l TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 56 n.24 (1977) ("the difference between the price at which [a manufacturer] sells to its retailers and their price to the consumer [is] his 'cost of distribution'") (quoting Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 283 (1975)); *see also Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 896 (2007). Thus, every case involving monopolization in the middle of the distribution chain could be said to be about "distribution services" as to which the effect on consumers is merely "indirect" and therefore not redressable by them. Antitrust law, however, does not recognize any such limitation on standing to sue.[9]

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[9] This case is unlike *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 (8th Cir. 1998). There, the plaintiffs, concert ticket buyers, explicitly alleged that they purchased "ticket distribution services"—services for which concert venues had to first engage Ticketmaster. *Id.* Here, on the other hand, respondents allege that they purchased apps as end users—not services that Apple provided to developers. *See also* Resp. Br. 35-37 (distinguishing *Campos*). And in all events, for the reasons set forth

C. Apple's Single-Plaintiff Argument Lacks Merit

As Areeda & Hovenkamp explain, "The mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another. For example, successful predatory pricing, exclusive dealing or similar exclusionary practices injure rivals by destroying their profits or their businesses; it ultimately injures consumers as well through higher product prices." IIA Areeda & Hovenkamp, *supra*, ¶ 339d, at 136. Thus, Apple is surely incorrect when it states (Pet. Br. 32), "Determining the 'direct purchaser' is . . . necessarily an endeavor to find *one* appropriate plaintiff group among the categories of possible plaintiffs, thus *eliminating* any potential risk of duplicative recoveries." *See, e.g., Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982) (patient treated by a psychologist and psychologists themselves had standing to sue Blue Shield for conspiring to limit insurance benefits to treatment by psychiatrists).

Consumers commonly have standing in monopolization cases to challenge anticompetitive restraints affecting rivals or suppliers, which result in higher market prices. *See, e.g., In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009) (monopolist's customers stated a claim based on the defendant's *"Walker Process"* fraud in procuring a patent by which competitors could be excluded); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001) (where a drug manufacturer's exclusive dealing contracts with its input suppliers

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here and in respondents' brief, the majority analysis in *Campos* is unsound.

enabled the manufacturer to increase its drug prices to customers, those direct-purchaser customers stated a Section 2 claim).[10] The fact that excluded firms may be more directly affected than consumers is of no moment.

D. Apple's Agency Argument Lacks Merit

Apple's suggestion that it merely acts as an agent of the developers does not change the *Illinois Brick* analysis.[11] First, whatever Apple may call itself in its developer license agreements, its relationship with respondents does not turn on the law of agency. In *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 24 (1964), a gasoline supplier entered into a "consign-

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[10] Consider a distribution monopolist that forces suppliers not to deal with rival distributors that have lower margins and lower retail prices. *Cf. Toys "R" Us v. FTC*, 221 F.3d 928 (7th Cir. 2000) (involving dominant retailer's exclusionary agreements with manufacturers). Potential plaintiffs with standing and distinct injuries would include: (a) excluded rivals that lose profits, (b) consumers that pay higher retail prices, and (c) suppliers that lose profits because of lower sales volume or artificially reduced wholesale prices.

[11] The agency argument is peculiar because if Apple really were the developers' agent, then the *Illinois Brick* rule would not apply. *See Illinois Brick*, 431 U.S. at 765 n.16 (control exception); *cf. Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 194 n.5 (2010) (principal and agent may be treated as a single economic unit). Moreover, if a retailer sets its prices at the direction of its supplier, consumers have standing to sue both the "innocent retailer" and the indirect supplier for unlawful resale price maintenance. *See, e.g., Reiter v. Sonotone, Corp.*, 486 F. Supp. 115 (D. Minn. 1980); IIA Areeda & Hovenkamp, *supra*, ¶ 339d, at 136. Yet here, where Apple is the retailer and main alleged antitrust violator, it claims that it may avoid suit by its direct consumers because its price is set by the suppliers. *Cf. In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671 (S.D.N.Y. 2012) (consumer action against publishers and Apple challenging conspiracy to fix retail prices).

ment" agreement with its service stations under which the supplier set the stations' resale prices. This Court disregarded the arrangement for antitrust purposes: "a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy." *Id.* at 18. To paraphrase this Court: "To allow [Apple] to achieve [monopolization] in this vast distribution system through this ["agency"] device would be to make legality for antitrust purposes turn on clever draftsmanship." *Id.* at 24. Legalisms aside, consumers understand that they are transacting directly with Apple.

Second, "[a]gency requires more than mere authorization to assert a particular interest. 'An essential element of agency is the principal's right to control the agent's actions.'" *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01, cmt. at f (2005)); *see also Edwards v. Freeman*, 34 Cal. 2d 589, 592, 212 P.2d 883, 884 (Cal. 1949) ("In the absence of the essential characteristic of the right of control, there is no true agency . . . . "). Apple cannot credibly contend that it is within the "control" of the developers.

Just the opposite. The complaint alleges that Apple is a distribution monopolist. It dictates the terms of its contracts with app developers accordingly. Apple thus issues a non-negotiable form of license agreement to developers, which details the terms on which Apple will permit their apps to be sold in its App Store. Developers must distribute iOS apps exclusively through Apple, Pet. App. 51a-52a (¶40); Pet. Br. 2, and Apple's devices are, "by design" locked to deny "iPhone customers with a means to download Apps other than from Apple's App Store." JA 70. Ap-

ple's non-negotiable terms further direct that developers pay Apple 30% of the purchase price for each sale by Apple. Pet. Br. 2-3; Apple License, Sch. 2, §3.4. And, in offering its license, Apple dictates its own "appointment" as the developer's "agent" to host, market and deliver apps to end-users. Apple License, Sch. 2, §1.1.

Apple's reliance on *United States v. General Electric Co.*, 272 U.S. 476 (1926), is misplaced. In that case, General Electric, the patent owner and electric lamp manufacturer, was in control of the sales of GE products by its downstream sellers. The facts showed that the sellers were "genuine agents" of General Electric, *id.* at 484, and this Court, therefore, held that General Electric could set the price at which they sold GE lamps. Here, Apple's asserted capacity as "agent" for its developers is illusory; Apple controls the terms on which developers can make apps available for sale by Apple. Equally important, in *Simpson*, this Court emphasized that patent law protections provided "the ratio decidendi of the *General Electric* case. We decline the invitation to extend it." *Simpson*, 377 U.S. at 24 (citation omitted). There are no comparable patent considerations here.

Accordingly, although the App Store operates under an agency pricing model, which gives app developers constrained discretion to price the apps that Apple sells to consumers, Apple is not an agent of the app developers such that respondents should be considered direct purchasers of the app developers rather than of Apple.

III. POLICY CONSIDERATIONS UNDERLYING *HANOVER SHOE* AND *ILLINOIS BRICK* MILITATE IN FAVOR OF RESPONDENTS' STANDING

UtiliCorp holds that the application of the *Illinois Brick* rule does not depend on a case-by-case analysis of whether the policy considerations underlying the rule are applicable. But insofar as there may be disagreement over the appropriate "purchaser" classification, those policy considerations only reinforce treating respondents as direct purchasers. As Areeda & Hovenkamp explain, "one set of purchasers should never be identified as 'indirect' unless those identified as 'direct' (1) actually have the proper incentives to sue and (2) would themselves have a cause of action for overcharge damages rather than damages based on lost profits or some other figure." IIA Areeda & Hovenkamp, *supra*, ¶ 346j, at 214-15. Neither condition is satisfied here. More generally, respondents' standing would further the *Illinois Brick* policies of promoting deterrence and avoiding duplicative recoveries without bogging courts down in unduly complicated matters of proof.

A. Denying Standing to Consumer Victims of Distribution Monopolies Would Undermine Effective Private Enforcement

"Private enforcement of the [Sherman] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition." *Cal. v. Am. Stores Co.*, 495 U.S. 271, 284 (1990); *see also Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone

contemplating business behavior in violation of the antitrust laws."); *Reiter*, 442 U.S. at 344 ("Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); *see also* Hans B. Thorelli, *The Federal Antitrust Policy* 223, 225, 229 (1955) (the Sherman Act's treble-damages provision "buil[t] into the act the feature of self-enforcement that had been typical in cases of restraint of trade at common law . . . Congress put great faith in the act's capacity for self-enforcement taken over from the common law."). Indeed, *Illinois Brick* and *Hanover Shoe* are premised on "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws." *Illinois Brick*, 431 U.S. at 745.

To expand the *Illinois Brick* rule to prevent consumers from challenging a distribution monopoly that follows an agency pricing model would undermine private enforcement because suppliers are unlikely to make such a challenge, particularly when the monopoly is enforced by exclusive dealing agreements to which the suppliers are privy. *See Hanover Shoe*, 392 U.S. at 494 (seeking to avoid result that "those who violate the antitrust laws . . . would retain the fruits of their illegality because no one was available who would bring suit against them").

That suppliers are unlikely to challenge a distribution monopoly is amply demonstrated here. Respondents filed this case in late 2011, and in the nearly-seven years since then, no developer has sued. Pet. App. 3a. While the reason could be, as some of petitioner's amici assert, the lawsuit lacks merit, it is

also clear that app developers have strong incentives not to challenge Apple's monopoly. First, as respondents explain, some app developers may benefit from the monopoly because Apple's exclusivity and pricing provision insulate many developers against competition from other iOS app developers. Resp. Br. 41; *see also* Amicus Br. of ACT | The App Ass'n 4 (supporting petitioner because consumers should not be allowed to "tak[e] issue with upstream negotiations" between app developers and petitioner). Second, and equally important, developers cannot risk the possibility of Apple removing them from the App Store if they bring suit.

App developers that seek to offer apps to iPhone users must do so through the App Store. *See supra* p. 3. The impact of Apple's distribution exclusivity is significant. Recently, Epic—the developer of the popular gaming app, Fortnite (*see* Pet. Br. 27)—decided to bypass Google's Play Store[12] to distribute its game. Epic, however, did not extend its decision to the App Store because "it didn't have a choice. 'If the question is "Would you have done this on iOS if you could have?" the answer would be "Yes,"' the company told CNET." *See* Sean Hollister, *Fortnite Is Putting Users At Risk, To Prove A Point About Google's Android Monopoly*, CNET (Aug. 9, 2018),

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[12] In contrast to Apple, Google does not require exclusivity for developers who write apps for Google's Play Store. *See* Google LLC, Alternative distribution options, Google Play (Apr. 17, 2018), https://developer.android.com/distribute/marketing-tools/alternative-distribution ("As an open platform, Android offers choice. You can distribute your Android apps to users in any way you want, using any distribution approach or combination of approaches that meets your needs.").

https://www.cnet.com/news/fortnite-is-putting-users-at-risk-to-prove-a-point-about-googles-android-monopoly/.

Epic's concern is well-founded. Under its Apple license, "Apple reserves the right to cease marketing, offering, and allowing download" of apps "at any time, with or without cause, by providing notice of termination to You [the developer]." Apple License, Sch. 2, § 7.3. The unwillingness of a highly successful developer like Epic to challenge Apple explains why the many less successful developers will not either, despite reported discontent in the developer community over Apple's 30% charge.[13]

Finally, there are no competitors, *i.e.*, third-party distributors of iOS apps, that might challenge Apple's monopoly precisely because Apple has prevented such competition. Accordingly, if consumers are denied standing here, it is likely that Apple would avoid all damages that its allegedly illegal conduct has caused, and private enforcement against distribution monopolies that use an agency pricing model would be seriously undermined.

B. Apple Is Not Exposed to Duplicative Recoveries

Illinois Brick's concern with duplicative recoveries is not present here. There is no risk of duplicative damages because, if developers were to sue, they would not seek damages on the same overcharge theory available to respondents.

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[13] *See* Mark Bergen & Christopher Palmeri, *Apple and Google Face Growing Revolt Over App Store 'Tax'*, Bloomberg (Aug. 22, 2018), https://www.bloomberg.com/news/articles/2018-08-22/apple-and-google-face-growing-revolt-over-app-store-tax.

Respondents assert that the purchase price they paid to Apple was inflated because, in a competitive market, they could have purchased from other online retailers or directly from app developers at lower retail prices. Damages will be based on the amount of the overcharge, generally "measured by the difference between the price paid and what the market or fair price would have been" absent the violation. *Hanover Shoe*, 392 U.S. at 489-90 (citing *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906)). The overcharge is not the increased commission itself, but the increase in the retail price paid directly by consumers of which the commission is a part.[14]

App developers would proceed on a "lost profits" basis analogous to the theory that any seller would assert in response to monopolized (or monopsonized) distribution.[15] They would be damaged by reduced sales due to higher retail prices and a reduced margin on each sale. This is not duplicative of consumers' damages from higher retail prices, even if the overcharge to consumers is entirely a product of the monopsony effect on app developers. *See* Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopso-*

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[14] As respondents point out, "the overcharge has not been passed on by anyone to anyone." Resp. Br. 39. To be sure, establishing but-for retail prices may require respondents to show how app developers would have priced their apps if faced with lower-cost, or less-restricted, forms of distribution. But that is common in antitrust cases. *See infra* at pp. 26-28.

[15] In the unlikely event that app developers were to sue and seek overcharge damages as purchasers of Apple's distribution services, duplicative damages would be avoided either because consumers would be considered "the" direct purchaser, *see supra* note 8, or app developers' overcharge (increase in cost) would be equal to the reduction in payments they actually receive.

ny, 76 Cornell L. Rev. 297, 338 (1991) ("[T]here is no apportionment or multiple liability problem in the case of damages [to sellers and purchasers] due to . . . monopsony . . . ."). [16] Moreover, app developers' lower profits from app sales may reduce developer's incentives to create new iOS apps or to improve existing ones via updates and fixes—the way that a higher marginal tax rate reduces the incentive of the taxpayer to generate income. Again, there is injury to developers in the form of lost profits on new apps that developers would have created and submitted to Apple for sale.

C. Respondents' Proof of Damages Would Not Be Unmanageable

Apple argues that analyzing respondents' claim would present insuperable complexities: there are "millions of apps sold—and priced—by tens of thousands of iOS developers . . . perform[ing] thousands of different functions, in competition with countless different potential substitutes." Pet. Br. 27. According to Apple "demand and supply elasticities would need to be estimated . . . on a scale never before imagined, let alone undertaken." *Id.*

Apple's hyperbole is unpersuasive. As respondents point out, app developers' lost-profits claims would require the same kind of estimation as respondents' overcharge claim here. Resp. Br. 45. Indeed, Apple confronted a similar situation in the "eBooks" conspiracy case. In 2011, private plaintiffs—eBooks purchasers—sued Apple for damages, alleging

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[16] But, as respondents point out, the exclusivity and tiered-pricing provisions of Apple's distribution monopoly may also drive up prices by reducing competition among app developers. *See* Resp. Br. 41.

that Apple orchestrated a conspiracy with publishers to fix the prices for books sold online. *Elec. Books*, 859 F. Supp. 2d at 673. A later-filed enforcement action by the United States and 33 States was tried, and the district court held that Apple violated the Sherman Act. *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

The private plaintiffs and various States continued their damages claims against Apple and the publishers on behalf of persons who purchased eBooks from Apple. Plaintiffs' damages required a determination of the but-for price of eBooks. On class certification, the plaintiffs' expert analyzed "transaction records for more than 149 million sales of 1.3 million different titles." *In re Elec. Books Antitrust Litig.*, No. 11-md-2293, 2014 WL 1282293, at *9 (S.D.N.Y. Mar. 28, 2014) ("*eBooks Class Cert. Decision*"). The analysis covered eBooks offered by five major publishers, marketed in various trade categories, and sold at different price tiers on the websites of seven eBook vendors. *See id.*; *United States v. Apple, Inc.*, 791 F.3d 290, 296 (2d Cir. 2015).

Apple opposed class certification, arguing that "each of the *150 million* e-book purchases . . . has its own unique history and must be evaluated separately." *eBooks Class Cert. Decision*, 2014 WL 1282293, at *14 (internal quotation marks omitted). Unpersuaded, the court certified a purchaser class: plaintiffs' expert's multivariate regression analysis properly "disentangled the effect of collusion on e-book prices, generating a model that explains 90% of the variance among titles' pricing." *Id.* The litigation subsequently settled with Apple and the publishers paying, in the aggregate, more than $560 million. Final Report Regarding Consumer Distribution, *In re Elec. Books An-*

titrust Litig., No. 11-md-02293 (S.D.N.Y. June 21, 2018), ECF No. 698. Similarly, in *In re High-Tech Employee Antitrust Litig.*, a wage-fixing antitrust case, defendants argued that compensation was "highly individualized with wide variation . . . set by hundreds of different managers who were directed to differentiate pay." 985 F. Supp. 2d 1167, 1214 (N.D. Cal. 2013). But problems of proof of damages did not prevent denial of summary judgment, a grant of class certification or approval of settlements of over $420 million. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *16 (N.D. Cal. Sept. 2, 2015).

Likewise, the DOJ and FTC often litigate proposed mergers of companies that sell a large array of products based on analyses of the transaction's probable price effects.[17] Expert analysis focuses on whether the merger might raise prices overall to *retail customers* and, if so, by how much. These cases similarly illustrate that econometric tools are up to the task here.

IV. THIS COURT SHOULD NOT REVISIT *ILLINOIS BRICK* AND *HANOVER SHOE*

The United States points out that since *Illinois Brick* was decided, many States have authorized indirect purchasers to sue under their own state anti-

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[17] *See, e.g., FTC v. Advocate Health Care Network*, 841 F.3d 460, 467–68 (7th Cir. 2016) (hospital services—a "cluster" product market where customer demand is measured across a suite of products rather than individual products) (citing authorities); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) (grocery store items); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 117 (D.D.C. 2016) (office supply superstores "cluster[ing] consumable office supplies into one market for analytical convenience").

trust laws. *See* U.S. Br. 18. The benefits and costs of the resulting system of related parallel federal and state antitrust cases are matters of on-going debate. *Id.* at 18-19. The Antitrust Modernization Commission recommended federal legislation to abrogate *Hanover Shoe* and *Illinois Brick*, permit indirect purchaser suits, and apportion damages. *See* Antitrust Modernization Comm'n, Report and Recommendations vi-vii, 18, 265-83 (Apr. 2007) ("AMC Report"). AAI was critical of the AMC's recommendations because the proposal, as crafted, would have reduced deterrence. And the AMC's critique of the existing system failed sufficiently to account for the then-recent enactment of the Class Action Fairness Act ("CAFA"), which expanded federal jurisdiction over class actions asserting state law claims, including antitrust claims arising in "repealer" States. *See* 28 U.S.C. § 1332(d). CAFA, together with existing multi-district procedures, *see* 28 U.S.C. §§ 1407 et seq., allow both federal and state antitrust claims to be heard in federal court by a single judge, assigned for all pretrial purposes.

In any event, like the United States and other amici of petitioners, we agree that "the only question presented is how to apply [*Hanover Shoe* and *Illinois Brick*] here." U.S. Br. 19; *see also* Amicus Br. of Washington Legal Foundation 8-17. Whether further change is warranted is appropriately left to Congress.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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